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WM. R. S

In the Supreme Court of the United States

October Term 1925

No. 185

ARTHUR E. DONEGAN, *Appellant*,

vs.

B. E. DYSON, as United States Marshal for the Southern District of Florida, *Appellee*.

Appeal from the District Court of the United States for the Southern District of Florida

MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM UNDER RULE 6

BRIEF AND ARGUMENT IN BEHALF OF ARTHUR E. DONEGAN, APPELLANT

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The case is sufficiently and correctly stated in the statement by the Solicitor General accompanying the motion herein, and a further statement is unnecessary.

In the statement of the case reference is made to the appellant "having thus exhausted the oppor-

tunities for direct review of his conviction" and "that the appellant may without further delay begin to serve the sentence imposed upon him nearly three years ago." In the historical review of the case reference is made to the fact that this Court denied appellant's petition for certiorari (265 U. S. 585). In this connection it is submitted that the presentation, the sanction or the denial of a petition for certiorari in this Court neither affirms nor denies any legal proposition presented; but it is true with regard to the petition for certiorari referred to, that the entire record in this case is now in the files of this Court and may for any purpose be consulted by the Court on its own motion or for its own purposes. A reference to this record will disclose:

(a) That the offense for which appellant was indicted and convicted was never committed at all. Putnam vs. U. S., 162 U. S. 687.

(b) That if the offense alleged was committed it was not committed by any of the means alleged in the indictment.

(c) That if said offense was committed and committed by any of the means alleged, that appellant had no connection with it, either by act, conduct, presence, authorization, ratification, or knowledge.

In these circumstances and while this Court may not feel at liberty or inclined, in this proceeding, to test the title, both de jure and de facto of a Judge, to reconsider its denial of appellant's petition for certiorari, and sanction the petition and order the judgment of the Circuit Court of Appeals reversed, yet this much at least is true, and that is that this

appellant should not upon this summary motion be denied the right of oral argument and personal appearance by himself or counsel in the Supreme Court of the United States. A motion to have this case advanced or allowed to come up in its order, would have been much more considerate. It cannot have escaped the attention of the Attorney General and the Solicitor General, now familiar with the entire record and history of this case, that it was affirmed in the Circuit Court of Appeals upon the announcement of a rule of evidence prevailing nowhere in the world, except in Russia, and directly in conflict with the rule of this Court in U. S. ex rel. Bilokumsky vs. Tod, U. S. Supreme Court, Nov. 12, 1923, and directly in defiance of the Act of Congress dated March 16, 1878, Sec. 1465, Compiled Statutes of 1913, providing among other things, "The person so charged shall at his own request, but not otherwise, be a competent witness, *and his failure to make such request shall not create any presumption against him.*"

The foregoing is submitted for such aid as it may be to the Court in determining whether this case will be taken up in its regular order and determined after oral argument by counsel, or whether it will be called summarily and the appellant denied the privilege of appearing by counsel in the presentation of an important question involving the jurisdiction and power of a Judge.

THE DISTRICT JUDGE WHO PRESIDED IN THE TRIAL COURT WAS NOT A JUDGE DE JURE.

He, Judge Julian W. Mack, was one of the five additional circuit judges appointed and assigned to the Court of Commerce pursuant to the Act of June 18, 1910, Chap. 309, 36 Statutes at Large, 539. He was *a judge without a circuit,* and, so far as the record discloses and appellant is advised, was never assigned to the *Fifth Circuit.*

The Court of Commerce was abolished by the Act of Congress approved October 22, 1913, which took effect December 31, 1913. This Act among other things provided that "such judges shall continue to act under assignment *as in the said Act provided* as judges of the district courts and circuit courts of appeals."

Two propositions are submitted in this connection:

1. That the provisions of the above mentioned Act of October 22, 1913, repealing "All Acts and parts of Acts in so far as they relate to the establishment of the Commerce Court," operated to repeal Sections 200 to 206, inclusive, of the Judicial Code.

2. If Section 201 of the Judicial Code was not repealed as in conflict with the other statutory machinery provided for the designation of circuit judges to hold district courts, then it is submitted that a Circuit Judge, surviving the Court of Commerce, *a Judge without a circuit,* when and if as-

signed to the Fifth Circuit or any other circuit, comes to the circuit, and by the express terms of Section 201 of the Judicial Code "shall have the power and jurisdiction in this Act (meaning the Act adopting the Judicial Code), conferred upon *a circuit judge in his circuit.*"

A circuit judge of the Fifth Circuit, for example, under the Judicial Code and under the law, has absolutely no jurisdiction or power in the first instance and in the absence of proper designation to hold a district court in his own circuit.

Nothing is to be found in the statutes authorizing the senior circuit judge of a circuit to make a certificate of accumulation and urgency of business as a basis for a circuit judge of the class to which Judge Mack belonged to come into the Fifth Circuit and hold a district court. It is conceded, we assume, that no other *circuit judge of any circuit* in the United States, other than the Fifth Circuit, could legally hold a district court within the Fifth Circuit under any possible sort of designation.

A survivor of the Court of Commerce in proper circumstances, properly certified, beginning with the Clerk's certificate, might possibly do so if he were assigned by the Chief Justice to the Fifth Circuit and by the presiding Judge or Judges of that Court assigned to the district court.

It may be contended that support is found for the designation of this particular circuit judge to hold this court in Section 18 of the Judicial Code. This Section according to its terms as it originally stood, may have justified the Chief Justice in mak-

ing this designation of this Circuit Judge, but by the Act of Sept. 14, 1922, Chap. 306, 42 Stat. at Large, 837, Sec. 18 of Judicial Code was amended. The substance of the amendment of Section 18 is to authorize the Chief Justice in the circumstances mentioned to designate and assign any circuit judge *of a judicial circuit* to hold a district court *within such circuit.* Said Section 18 as amended further provides that during the period of service of any judge designated and assigned under this Act, he shall have the powers and rights and perform all the duties of a judge of the district or a justice of the court to which he has been assigned (except, etc.) This Section 18 as amended clearly is legislation affecting circuit judges within their respective circuits, so far as holding a district court is concerned, although by reference to the old Judicial Code it may be construed to give a visiting judge like Judge Julian Mack assigned to and sitting in the Circuit Court of Appeals, the power and jurisdiction of a judge of that court.

The two paragraphs of Section 18 as amended of the Judicial Code are to be construed together, and what Congress had in mind was the designation of a *circuit judge of a judicial circuit to hold a district court within and only within such circuit.*

While Section 986 of the United States Compiled Statutes, quoting Judicial Code, Sec. 19, says that it shall be the duty of the District or Circuit Judge who is designated or appointed under either of these preceding sections, to discharge all the judicial duties for which he is so appointed, and dur-

ing the time for which he is so appointed, and all of the acts and proceedings in the courts held by him or by and before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the District Judge of the said District Court; yet by reference to said six preceding sections it will be noted that the *circuit judge* there spoken of, and only such a judge, was *a circuit judge of the circuit within which the proposed district court was to be held.*

The appointment of another judge in these circumstances could only be made by one of the circuit judges of the circuit in which the district lies or the circuit justice for that circuit, and then only when the fact of the accumulation or urgency of business is made to appear by the certificate of the Clerk of the Court under the seal of the Court, addressed to a Circuit Judge, or in the absence of all of them, to the Circuit Justice.

If the order designating Judge Mack is sought to be sustained under Judicial Code, Sec. 15, it will be noted that the Chief Justice may designate a district judge within such circuit or within any other circuit, but only under the conditions named in Sec. 15, and upon a *certificate of the Clerk of the District Court* to the Chief Justice.

All of the pertinent provisions of the Judicial Code and all of the Acts of Congress in regard to the designation of judges are to be construed together and when so construed it is clear that all such designations and assignments on account of accumulation of business, absence of circuit judges or of cir-

cuit justice, new appointments and revocations and designations in aid of other judges, are to be based initially upon a certificate of the Clerk of the District Court. These are the plain terms of the law, and must be complied with to give any validity or support either to the certificate of the presiding judge of a circuit or to a designation by the Chief Justice made thereon.

JUDGE JULIAN W. MACK WAS NOT A JUDGE DE FACTO

The doctrine of de facto judges has been said to have no application where there is already an incumbent of the office. Moriss vs. Virginia Insurance Company, 8 S. E. Rep. 383; Keith vs. The State, 49 Ark. 439.

The authority of substituted judges is sustained, not under the de facto rule, but because they are, for the time being, lawful judges in the courts wherein they sit. Kennedy vs. Com., 78 Ky. 447.

When a mode of selection is prescribed of a substitute, or special judge, and it indicates the causes which will justify such selection, it excludes other modes of selection and other causes. State vs. Phillips, 27 La. Ann. 663.

The King himself, though he be entrusted with the whole executive power of the law, cannot sit in judgment in any court, but his justice and the laws must be administered according to the powers com-

mitted to and distributed among his several courts of justice. 2 Bac. Abr. 619.

They cannot act by deputy, nor in any way transfer their power to another. Id. 620.

The Act of April 10, 1869, providing for the appointment of circuit judges, gave them the same power and jurisdiction in a circuit as the justice of the Supreme Court allotted to that circuit.

Every construction on the question of jurisdiction and power of a circuit judge in a district court should be strict, because his jurisdiction and power was originally only that of the Supreme Court Justice allotted to the circuit, because the circuit court when in existence had no criminal jurisdiction except in a limited class of cases, and was a court of appeal or review from the district court.

Attorneys for Arthur E. Donegan, Appellant.